currently, that customers expect to receive such services from their wireline provider, or that they expect to use such services in the way that they expect to receive or use the above-listed services.[132]

47. We will, however, add protocol conversions to the list of services that carriers may market using CPNI without customer approval. In its petition, Bell Atlantic requests that we redefine protocol conversion as a telecommunications service.[133] A protocol conversion assists terminals or networks operating with different protocols to communicate with each other.[134] Bell Atlantic asserts that protocol conversions that do not alter the underlying information sent and received should not be defined as information services.[135] We do not believe that protocol conversions should be redefined as a telecommunications service but because protocol conversions are necessary to the provision of the telecommunications service, in the instances where they are used, protocol conversions should be included in the group of information services listed above. [136] Accordingly, we grant Bell Atlantic's request to use CPNI to market, without customer approval, protocol conversions.

3. Petitions for Forbearance

a. Introduction

48. In the alternative, many parties urge the Commission to forbear from

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[132] If, in the future, it becomes apparent that customer expectations, and the public interest, requires that we reconsider our determination here, we will entertain requests to do so.

[133] Bell Atlantic Petition at 8-9.

[134] *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21955, ¶ 101, n.229. "'Protocol processing' is a generic term, which subsumes 'protocol conversion' and refers to the use of computers to interpret and react to the protocol symbols as the information contained in a subscriber's message is routed to its destination. 'Protocol conversion' is the specific form of protocol processing that is necessary to permit communications between disparate terminals or networks." *Id.* (citing *IDCMA Petition for Declaratory Ruling That AT&T's Interspan Relay Service is a Basic Service*, Memorandum Opinion & Order, 10 FCC Rcd 13717, 13717-18, n.5 (Com. Carrier Bureau 1995)).

[135] Bell Atlantic Petition at 9.

[136] *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21956, ¶ 104; *see also* 47 U.S.C § 153(20). In the *Non-Accounting Safeguards Order*, we specifically rejected the argument that "information services" only refers to services that transform or process the content of the information transmitted by an end-user because the statutory definition makes no reference to the term content, but only requires that an information service transform or process information. *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21956, ¶ 104. To the extent that we have in the past, however, treated certain protocol processing services as telecommunications services, because they result in no net protocol conversion to the end-user, we continue to do so for CPNI purposes. *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 21957-58, ¶ 106.

prohibiting CMRS providers and wireline carriers from using CPNI to market CPE and/or information services without customer approval.[137] As we described in detail *supra*, section 10 of the Act requires the Commission to forbear from regulation when: (1) enforcement is not necessary to ensure that the carrier's charges and practices are just and reasonable; (2) enforcement is not necessary for the protection of consumers; and (3) forbearance is consistent with the public interest.[138]

b. CMRS Providers

49. In the preceding section, we granted the petitions for reconsideration to allow CMRS providers to use CPNI, without customer approval, to market CPE and information services to their customers. Therefore, we deny as moot the petitions for forbearance from section 222's prohibition against CMRS providers using CPNI to market, without customer approval, CPE and information services.[139]

c. Wireline Carriers

50. In the preceding section, we granted the petitions for reconsideration to allow wireline carriers to use CPNI, without customer approval, to market CPE and some information services to their customers. Therefore, we deny as moot the petitions requesting that we forbear from enforcing section 222's prohibition against wireline carriers to use CPNI to market CPE and information services such as call answering, voice mail or messaging, voice storage and retrieval services, fax storage and retrieval services, and protocol conversions.[140] Bell Atlantic has requested that we forbear from enforcing section 222's

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[137] 360° Communications Petition at 3-6; Ameritech Petition at 7-8; Bell Atlantic Petition at 10-12, 13-16, 20-22; CTIA Petition 35-42; CommNet Cellular Petition at 4-9; GTE Petition at 12-15, 18-21, 24-26, 30-32; PageNet Petition at 5, n.3; PCIA Petition for Forbearance at 9-12, 13-15; PrimeCo Petition at 11-15; USTA Petition at 5-6; SBC Comments at 2-5.

[138] *See* discussion *supra* Part V.A.3.

[139] 360° Communications Petition at 3-6; Ameritech Petition at 7-8; Bell Atlantic Petition at 10-12, 13-16, 20-22; CTIA Petition 35-42; CommNet Cellular Petition at 4-9; GTE Petition at 12-15, 18-21, 24-26, 30-32; PageNet Petition at 5, n.3; PCIA Petition for Forbearance at 9-12, 13-15; PrimeCo Petition at 11-15; USTA Petition at 5-6; SBC Comments at 2-5. To the extent that the petitioners who filed petitions for forbearance on these issues believe that we have mischaracterized their petitions, we invite them to ask us for clarification.

[140] Ameritech Petition at 2-6 (requesting forbearance for use of CPNI to market CPE and voicemail); GTE Petition at 18-21, 24-26 (requesting forbearance for use of CPNI to market CPE, voicemail, store and forward services, and short messaging service); SBC Comments at 5-9 (requesting forbearance to use CPNI to market CPE and voicemail). Again, to the extent that we have mischaracterized any of the petitioners' arguments, we invite them

prohibition against using CPNI without prior customer consent to market all information services.[141] As explained below, we deny this request.

51. *Section 10(a)(1).* In support of its request for forbearance, Bell Atlantic argues that enforcement of the CPNI prohibition is not necessary to ensure that the charges, practices, classifications, or regulations are reasonable and non-discriminatory. Bell Atlantic states that the BOCs must obtain all underlying telecommunications services that they use to provide information services at the same unbundled tariff rates that are available to their competitors and that the BOCs are subject to similar nondiscrimination requirements with respect to the installation and maintenance of wireline telecommunications service in connection with information services as they are for CPE.[142]

52. The primary focus of the CPNI rules is not, nor ever has been, intended to ensure reasonable rates or practices. Therefore, we determine that enforcement of the restrictions on the use of CPNI to market those information services that are not "necessary to, or used in, the provision of" telecommunications services are not necessary to ensure that the charges, practices, classifications, or regulations are just and reasonable and are not unjustly or unreasonably discriminatory.

53. *Section 10(a)(2).* Bell Atlantic contends that CPNI restrictions are not necessary to protect consumers because the use of CPNI would not result in unreasonable rates and because such use would be consistent with consumers' expectations. Bell Atlantic notes that consumers have benefitted for more than a decade from Bell company integrated provision of telecommunications and information services without the need for prior consent to use CPNI. They also argue that the information services market is competitive, thus obviating the need for any CPNI obligations, and that enforcement of such obligations would simply serve to confuse consumers by frustrating their efforts to easily obtain information about telecommunications and information services in the course of a single contact with a carrier representative.[143]

54. We are unable to conclude that forbearing from enforcement of restrictions on the use of CPNI for marketing all information services would satisfy the second criterion. We note, however, that the "integrated" services that Bell Atlantic identifies include the information services which we have found above to be necessary to, or used in, the provision of the underlying telecommunications service. We have, on reconsideration, identified those

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to request a clarification.

[141] Bell Atlantic Petition at 9-16.

[142] Bell Atlantic Petition at 13-14.

[143] Bell Atlantic Petition at 14-15.

types of information services for which our broader interpretation of section 222(c)(1)(B) is more in line with customer expectations and congressional intent. For these services, forbearance is not necessary. With regard to other information services such as Internet access, we find that enforcing section 222(c)(1)(B) is still necessary to protect consumers. Requiring prior consent protects customers in many instances where they would not realize potentially sensitive, personal information had been accessed or used. As noted above, there is no evidence, currently, that customers expect to receive such services from their wireline provider, or that they expect to use such services in the way that they expect to receive or use more integrated services. Nor are we aware of any other law, regulation, agency or state requirement that would substitute for the effectiveness of a prior consent requirement, which protects customer privacy expectations by placing the control over the use of CPNI for purposes of marketing non-integrated information services in the hands of the customer.

55. *Section 10(a)(3).* Bell Atlantic also argues that the Commission has already found, under Computer III, that it is in the public interest to permit the Bell Companies to use CPNI, subject to an "opt-out" option, because this approach enables Bell companies to engage in integrated marketing and sales of basic and enhanced services.[144] Bell Atlantic asserts, therefore, that the Commission has already made the public interest finding required under section 10(a)(3). We concluded in the CPNI Order, however, that "[u]nlike the Commission's pre-existing policies under Computer III, which were largely intended to address competitive concerns, section 222 of the Act explicitly directs a greater focus on protecting customer privacy and control."[145] We further concluded that "[t]his new focus embodied in section 222 evinces Congress' intent to strike a balance between competitive and customer privacy interests different from that which existed prior to the 1996 Act, and thus supports a more rigorous approval standard for carrier use of CPNI than in the prior Commission Computer III framework."[146] More specifically, we concluded that an opt-out scheme does not provide any assurance that consent for the use of a customer's CPNI would be informed, and found that opt-out does not adequately protect customer privacy interests.[147] Bell Atlantic, therefore, is incorrect in its assertion that our conclusions in Computer III dictate our findings relating to

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[144] *See* Bell Atlantic Petition at 15-16, *citing Amendment to Sections 64.702 of the Commission's Rules and Regulations, Policy and Rules Concerning Rates for Competitive Common Phase II Carrier Service and Facilities Authorizations Thereof, and Communications Protocols under Section 64.702 of the Commission's Rules and Regulations*, Report and Order, CC Docket 85-229, 2 FCC Rcd 3072, 3095, ¶ 155 (1987) (Third Computer Inquiry); Memorandum Opinion and Order on Reconsideration, 3 FCC Rcd 1150, 1162-63, ¶ 97 (1988); *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, Report and Order, CC Docket No. 90-623, 6 FCC Rcd 7571, 7609-10 ¶ 85 (1991).

[145] *CPNI Order*, 13 FCC Rcd at 8135, ¶ 96.

[146] *CPNI Order*, 13 FCC Rcd at 8135, ¶ 96.

[147] *CPNI Order*, 13 FCC Rcd at 8130-32, ¶ 91.

the public interest. We also conclude that the record on forbearance suggested here does not convince us that the privacy goals of the statute are met where carriers can use CPNI without express customer approval to sell services outside the existing customer-carrier relationship. We accordingly find that Bell Atlantic's request for forbearance of section 222's affirmative approval requirement is generally inconsistent with the public interest. Customers who are interested in obtaining more information can arrange to do so easily by granting consent for their carriers' use of CPNI. We have found no public interest benefits that would outweigh these concerns.

56. Pursuant to section 10(b) of the Act, we have evaluated whether forbearance from the prior consent requirement will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services. As we concluded above, the ability to use CPNI from an existing service relationship to market new services to a customer bestows an enormous competitive advantage for those carriers that currently have a service relationship with customers, particularly incumbent exchange carriers and interexchange carriers with a large existing customer base. This, in turn, poses a significant risk to the development of competition. Therefore, to the extent that Bell Atlantic is requesting forbearance from section 222's restrictions on the use of CPNI to market Internet access service, we find that such forbearance would neither promote competition nor enhance competition among telecommunications service providers. For instance, we recently stated that, although many Internet service providers (ISPs) "compete against one another, each ISP must obtain the underlying basic services from the incumbent local exchange carrier, often still a BOC, to reach its customers."[148] Because of the competitive advantage that many BOCs retain, we concluded that we would not remove certain safeguards designed to protect against BOC discrimination despite the competitive ISP marketplace. We reach a similar conclusion here: giving wireline carriers, particularly ILECs, the right to use CPNI without affirmative customer approval to market Internet access services could damage the competitive Internet access services market at this point in time. Accordingly, we deny Bell Atlantic's petition for forbearance on this issue.

d. Forbearance from all CPNI Rules for CMRS Providers

57. A few parties urge the Commission to forbear from imposing any CPNI

[148] *In the Matter of Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, 1998 Biennial Regulatory Review—Review of Computer III and ONA Safeguards and Requirements*, FCC 99-36, 14 FCC Rcd 4289, 4301, ¶ 16 (1999).

obligations on CMRS providers.[149] Forbearance from enforcing all CPNI rules against CMRS carriers, according to one petitioner, will permit many beneficial and pro-competitive marketing practices to continue.[150] The Commission must forbear from enforcing its rules or any statutory provision where the criteria of the forbearance test, set out in Part V.A.3, infra, are satisfied. For the reasons discussed below, we deny this request.

58. *Section 10(a)(1).* According to 360° Communications, CMRS providers are constrained by market forces from charging unjust or unreasonable prices or engaging in unreasonable practices because the CMRS marketplace is highly competitive.[151] Customers who disapprove of a carrier's use of CPNI simply will change carriers.[152] Thus, the argument goes, for a carrier to maintain its customer base, it must not abuse or improperly use CPNI.[153] Bell Atlantic Mobile adds that these competitive forces in the CMRS market supplemented by sections 201 and 202 of the Act provide sufficient discipline against attempts to engage in unjust or unreasonable practices.[154] Moreover, Arch claims that CPNI rules prevent CMRS carriers from marketing their services in the most efficient manner.[155] The new rules, therefore, are unnecessary to prevent unreasonable or unjust carrier behavior.[156]

59. As we have previously stated, the primary focus of the CPNI rules is not, nor ever has been, intended to ensure reasonable rates or practices. Therefore, we determine that enforcement of the CPNI rules for CMRS carriers is not necessary to ensure that the charges, practices, classifications, or regulations are just and reasonable and are not unjustly or unreasonably discriminatory.

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[149] 360° Communications Petition at 3; Bell Atlantic Petition at 20; PageNet Petition at 5, n.3. *See also* Bell Atlantic Mobile Comments at 1. Arch Communications seeks forbearance from the application of those CPNI rules designed for markets with dominant carriers possessing market power. Arch Communications Comments at 7, n.22. While we are sensitive to the issues concerning market power and monopoly derived CPNI, we note, however, that the CPNI rules are designed to apply to all carriers in all markets, including competitive markets such as interexchange service.

[150] 360° Communications Petition at 6.

[151] 360° Communications Petition at 5.

[152] 360° Communications Petition at 5.

[153] 360° Communications Petition at 5.

[154] Bell Atlantic Mobile Comments at 3-4.

[155] Arch Communications Comments at 9.

[156] 360° Communications Petition at 5.

60. *Section 10(a)(2).* 360° Communications asserts that the new CPNI rules are unnecessary to protect the privacy interests of CMRS customers.[157] In the absence of prior CPNI restrictions,[158] CMRS customers have come to expect CMRS carriers to use their CPNI for "beneficial marketing practices" and, 360° Communications further contends, that a sudden change in these practices will cause significant consumer confusion and harm.[159] Arch avers that because of intense competition, CMRS carriers have every incentive to respect the privacy interests of their customers[160] who can freely switch carriers.

61. We are unable to find that CMRS customers' privacy interests would be adequately protected absent section 222 and the rules promulgated in this proceeding. We are concerned, for example, that customers would be harmed by elimination of the restriction on carriers' use of CPNI to identify or track customers who call competing service providers contained in section 64.2005(b)(1) of our rules. Section 222 and our implementing rules protect customers in many instances where they would not realize potentially sensitive, personal information had been accessed or used. Moreover, we would be remiss in our duty under the statute if we created an environment in which CMRS customers' only recourse was to switch carriers after discovering that their CPNI had been used without authorization. Nor are we aware of any other law, regulation, agency or state requirement that would substitute for the effectiveness of our rules implementing section 222. Consequently, the second criterion for forbearance has not been met.

62. *Section 10(a)(3).* 360° Communications argues that the public interest is served by the continuation of legitimate, beneficial marketing practices that have helped consumers manage their CMRS service costs and spurred competition by enabling carriers to differentiate themselves in the marketplace by offering new and enhanced service bundles.[161] Arch asserts that the central issue raised by the CPNI rules is that they prevent each competitive CMRS carrier from treating each of its customers as a unique individual.[162]

63. We do not find that forbearance from section 222 and our CPNI rules for all

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[157] 360° Communications Petition at 5.

[158] Bell Atlantic Petition at 11, 14 (CMRS consumers have benefitted from more than a decade of carriers' use of CPNI without need for affirmative customer consent).

[159] 360° Communications Petition at 6; *see also* Bell Atlantic Petition at 15.

[160] Arch Communications Comments at 8.

[161] 360° Communications Petition at 5.

[162] Arch Communications Comments at 9.

CMRS providers is consistent with the public interest. Complete forbearance[163] would eliminate section 222's procedures for the protection of both customers and carriers, such as the process for transferring CPNI from a former carrier to a new carrier pursuant to a customer's written request[164] and the obligation to protect carrier proprietary information.[165] Pursuant to section 10(b) of the Act, we have evaluated whether forbearance from section 222 for CMRS carriers will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services. On one hand, forbearance could promote a free flow of information from the carrier to the consumer, potentially decreasing the carriers' costs of marketing. Increased competition for subscribers could result in the further reduction of rates, particularly in an already competitive market. On the other hand, it would appear that any such benefits would be marginal, at best, especially in light of the actions taken herein that reduce the regulatory impact of section 222 compliance[166] and the continued importance of protecting consumers' privacy expectations. On balance, we find that forbearance from the full range of CPNI protections would undermine consumer privacy to an extent that outweighs the potential benefits demonstrated on the record in terms of carrier cost savings. Therefore, we conclude that there is insufficient basis for a public interest finding under the third criterion.

C. Use of CPNI to Market to Former and "Soon-to-be Former" Customers

1. Background

64. The *CPNI Order* adopted section 64.2005(b)(3) to prohibit a carrier from using

[163] *See* 360° Communications Petition at 3, 5-6; Bell Atlantic Petition at 20; *see also* Arch Communications Comments at 7; Bell Atlantic Mobile Comments at 1.

[164] 47 U.S.C. § 222(c)(2).

[165] 47 U.S.C. § 222(b).

[166] We note that this order on reconsideration lightens the impact of compliance with the CPNI rules by allowing CMRS providers to use CPNI, without customer approval, to market CPE and information services to their customers. This order also eliminates the prohibition on the use of CPNI for winback purposes. Further, this order also provides flexibility for technological differences in administrative systems with regard to the electronic safeguards rules, which should be beneficial to all companies, including CMRS providers. Moreover, with respect to independent CMRS providers, the practical effect is that many of the CPNI rules will not apply to them (or any single service category provider). Restrictions on marketing telecommunications service offerings impose minimal burdens on a carrier that remains within one category.

or accessing CPNI to regain the business of a customer who has switched to another provider.[167] The Commission decided as a matter of statutory interpretation that once a customer terminates service from a carrier, CPNI derived from the previously subscribed service may not be used to retain or regain that customer.[168] Specifically, the Commission foreclosed the use of CPNI for customer retention purposes under section 222(c)(1) because it felt such use was not carried out in the "provision of" service, but rather, for the purpose of retaining a customer that has already taken steps to change its provider.[169] The *CPNI Order* also precluded the use of CPNI under section 222(d)(1), insofar as such use would be undertaken to market a service, rather than to "initiate" a service within the meaning of that provision.[170]

65. A significant majority of the petitioners have requested that the Commission reconsider or forbear from the restrictions of section 64.2005(b)(3), which has been referred to as the "winback" prohibitions.[171] As noted by various petitioners, the concept of "winback" can be divided into two distinct types of marketing: marketing intended either to (1) regain a

[167] Section 64.2005(b)(3) states that: "[a] telecommunications carrier may not use, disclose or permit access to a former customer's CPNI to regain the business of the customer who has switched to another service provider." 47 C.F.R. § 64.2005(b)(3).

[168] *CPNI Order*, 13 FCC Rcd at 8126-27, ¶ 85.

[169] *CPNI Order*, 13 FCC Rcd at 8126-27, ¶ 85. Section 222(c)(1) provides that a telecommunications carrier that receives or obtains CPNI by virtue of its "provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable [CPNI] in the provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publication of directories." 47 U.S.C. § 222(c)(1).

[170] *CPNI Order*, 13 FCC Rcd at 8126-27, ¶ 85. Section 222(d)(1) provides that: "[n]othing in this section prohibits a telecommunications carrier from using, disclosing, or permitting access to customer proprietary network information obtained from its customers . . . (1) to initiate, render, bill, and collect for telecommunications services; . . ." 47 U.S.C. § 222(d)(1).

[171] 360° Communications Petition at 10-11; ALLTEL Petition at 7; AT&T Petition at 2-5; Bell Atlantic Petition at 16-17; Bell South Petition at 16-18; Comcast Petition at 16-18; CTIA Petition at 10-13, 31-42; Frontier Petition at 7-10; GTE Petition at 34; MCI Petition 49-52; Omnipoint Petition at 17-19; PageNet Petition at 2-4; PCIA Petition at 9-11; PCIA Petition for Forbearance at 15-16; PrimeCo Petition at 9-10; SBC Petition at 8-10; USTA Petition 6-9; Vanguard Petition at 12-14. *See also*, Airtouch Comments at 9-12; Ameritech Comments at 3; Arch Communications at 4-5; Cable & Wireless Comments at 2; CelPage Comments at 11; e.spire Comments at 4; Intermedia Communications Comments at 2; Sprint Comments at 4; U S WEST Comments at 3; RCA Reply Comments at 5; Time Warner Telecom Reply Comments at 4-9; PCIA Petition for Forbearance (filed June 29, 1998) at 15-16. *But cf.* Allegiance Telecom Comments at 5-8; ALTS Comments at 1-5; Cable and Wireless Comments at 2-5; Commonwealth Telecom Comments at 5-8; Focal Communications Comments at 5-8; KMC Telecom Comments at 5-8.

customer or (2) retain a customer.[172] Regaining a customer applies to marketing situations where a customer has already switched to and is receiving service from another provider.[173] Retention marketing, by contrast, refers to a carrier's attempts to persuade a customer to remain with that carrier before the customer's service is switched to another provider.[174] For the purposes of this section, we shall use the term "winback" to refer only to the first situation, where the customer has already switched to and is receiving service from another provider.[175]

2. "Winback"

a. Background

66. Petitioners challenge the winback restrictions on a variety of grounds. Some petitioners allege that the winback restrictions are not compelled by the statute[176] and are antithetical to the concepts embodied in the Communications Act of 1934, as amended.[177] Certain petitioners argue that if the Commission believes the winback rule is a reasonable interpretation of section 222, it should exercise its authority under section 10 to forbear from enforcing this provision because the anti-competitive effects outweigh any protection to customer privacy.[178] Various parties argue that the Commission violated section 553 of the Administrative Procedures Act by promulgating winback rules without adequate notice, comment and explanation.[179] Finally, a number of parties claim that the winback restrictions

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[172] MCI Petition at 49; Omnipoint Petition at 17; USTA Petition at 6-7; Cable & Wireless Comments at 2-3; SBC Comments at 19, n. 44; TRA Comments at 7.

[173] Omnipoint Petition at 18; USTA Petition at 6-7; Sprint Comments at 3-4.

[174] MCI Petition at 49; Omnipoint Petition at 18.

[175] We discuss and limit certain types of retention marketing in Part V.C.3, *infra*.

[176] 360° Communications Petition at 11; AT&T Petition at 2; PageNet Petition at 2; PCIA Petition at 9-10 (no congressional mandate to implement winback rule); Vanguard Petition at 14 (FCC not constrained to adopt such a rule); USTA Petition at 8 (lack of clear and irrefutable congressional directive in statute or legislative history); Arch Communications Comments at 5; AT&T Comments at 4; CelPage Comments at 10.

[177] BellSouth Petition at 16-17; GTE Petition at 35; USTA Petition at 7-8.

[178] Bell Atlantic Petition at 17; GTE Petition at 36.

[179] Bell Atlantic Petition at 16; PrimeCo Petition at 9; Omnipoint Petition at 17; SBC Petition at 8; USTA Petition at 6; but *cf.* Commonwealth *ex parte* (filed February 17, 1999) at 1-6; Focal Communications *ex parte* (filed February 17, 1999) at 1-6; KMC Telecom *ex parte* (filed February 17, 1999) at 1-6.

constitute an impermissible "taking" of their property rights under the Fifth Amendment.[180] In contrast, other parties generally support the Commission's adoption of winback restrictions in some instances, but urge the Commission to place additional restrictions on ILEC use of CPNI.[181]

b. Discussion

67. On reconsideration, we conclude that all carriers should be able to use CPNI to engage in winback marketing campaigns to target valued former customers that have switched to other carriers. After reviewing the fuller record on this issue developed on reconsideration, we are persuaded that winback campaigns are consistent with section 222(c)(1) and in most instances facilitate and foster competition among carriers, benefiting customers without unduly impinging upon their privacy rights. Accordingly, we reverse our position and eliminate rule 64.2005(b)(3).

68. On reconsideration, we believe that section 222(c)(1)(A) is properly construed to allow carriers to use CPNI to regain customers who have switched to another carrier. While section 222(c)(1) is susceptible to different interpretations, we now think that the better reading of this language permits use of CPNI of former customers to market the same category of service from which CPNI was obtained to that former customer. We agree with those petitioners who argue that the use of CPNI in this manner is consistent with both the language and the goals of the statute.[182] Section 222(c)(1)(A) permits the use of CPNI in connection with the "provision of the telecommunications service from which the information is derived."[183] The marketing of service offerings within a given presubscribed telecommunications service is encompassed within the "provision of" that service.[184] In developing the total service approach, the Commission recognized that marketing is implicit in the term "provision" as used in section 222(c)(1).[185] The *CPNI Order* stated that "we believe that the best interpretation of section 222(c)(1) is the total service approach, which affords

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[180] BellSouth Petition at 18; GTE Petition at 36.

[181] AT&T Petition at n.3; Frontier Petition at 8-9; MCI Petition at 49-52; Allegiance Telecom Comments at 5-8; ALTS Comments at 1-5; Cable and Wireless Comments at 2-5; Commonwealth Telecom Comments at 5-8; e.spire Comments at 4; Focal Communications Comments at 5-8; Intermedia Communications Comments at 3; KMC Telecom Comments at 5-8; LCI Reply Comments at 7; Time Warner Telecom Reply Comments at 4-9.

[182] 360° Communications Petition at 11; AT&T Petition at 2; Frontier Petition at 8; PageNet Petition at 2.

[183] 47 U.S.C. § 222(c)(1)(A).

[184] *CPNI Order*, 13 FCC Rcd at 8102, ¶ 54.

[185] *CPNI Order*, 13 FCC Rcd at 8087, ¶ 35.

carriers the right to use or disclose CPNI for, among other things, *marketing related offerings* within customers' existing service for their benefit and convenience."[186] While we recognize that this discussion in the CPNI Order also referred to the customer's "existing" service, we now conclude upon further reflection that our focus should not be so limited. Common sense tells us that customers are aware of and expect that their former carrier has information about the services to which they formerly subscribed. Businesses do not customarily purge their records of a customer when that customer leaves. We therefore disagree with ALTS' assertion that extending winback marketing for the same service to a former customer is an indefensible stretch of the total service approach.[187]

69. Because customer expectations form the basis of the total service approach, they properly influence our understanding of the statute, a goal of which is to balance competitive concerns with those of customer privacy.[188] Customers expect carriers to attempt to win back their business by offering better-tailored service packages,[189] and that such precise tailoring is most effectively achieved through the use of CPNI.[190] Winback restrictions may deprive customers of the benefits of a competitive market.[191] Winback facilitates direct competition on price and other terms, for example, by encouraging carriers to "out bid" each other for a customer's business, enabling the customer to select the carrier that best suits the customer's needs.[192]

70. Some commenters argue that ILECs should be restricted from engaging in winback campaigns, as a matter of policy, because of the ILECs' unique historic position as regulated monopolies.[193] Several commenters are concerned that the vast stores of CPNI

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[186] *CPNI Order*, 13 FCC Rcd at 8087, ¶ 35 (emphasis added). *See also id.* at 8081, ¶ 25 ("Under the total service approach, the customer's implied approval is limited to the parameters of the customer's existing service and is neither extended to permit CPNI use *in marketing* all of a carrier's telecommunications offerings regardless of whether subscribed to by the customer, nor narrowed to permit use only in providing a discrete service feature.")(emphasis added).

[187] ALTS Comments at 4.

[188] *See* BellSouth Petition at 17; GTE Petition at 34; SBC Petition at 9.

[189] 360° Communications Petition at 10; GTE Petition at 33; Vanguard Petition at 13.

[190] CTIA Petition at 11; PageNet Petition at 3.

[191] ALLTEL Petition at 7; AT&T Petition at 3-4; Omnipoint Petition at 18; PageNet Petition at 4; PCIA Petition at 10; PrimeCo Petition at 9; SBC Petition at 9; USTA Petition at 7; Sprint Comments at 1-2.

[192] Omnipoint Petition at 18; PageNet Petition at 4; PrimeCo Petition at 9.

[193] MCI Comments at 20-21; Time Warner Telecom Reply Comments at 4.

gathered by ILECs will chill potential local entrants and thwart competition in the local exchange.[194] We believe that such action by an ILEC is a significant concern during the time subsequent to the customer's placement of an order to change carriers and prior to the change actually taking place. Therefore, we have addressed that situation at Part V.C.3, *infra*. However, once a customer is no longer obtaining service from the ILEC, the ILEC must compete with the new service provider to obtain the customer's business. We believe that such competition is in the best interest of the customer and see no reason to prohibit ILECs from taking part in this practice.

71. We are also unpersuaded by the allegations that an incumbent carrier's use of CPNI in winback campaigns amounts to a predatory practice designed to prevent effective market entry by new competitors.[195] Contrary to the commenters' suggestions, we believe such use of CPNI is neither a *per se* violation of section 201 of the Communications Act, as amended, nor the antitrust laws. While excessively low pricing and other exclusionary practices may contravene antitrust law, commenters proffer neither facts nor convincing arguments that their legal conclusion is a realistic concern. Prior to the adoption of the rules promulgated under 1996 Act, incumbent carriers were able to use CPNI to regain customers lost to competitors. Assuming incumbent LECs have sufficient market power to engage in predatory strategies, they are constrained in their ability to raise and lower prices by our tariff rules and non-discrimination requirements.[196] Because winback campaigns can promote competition and result in lower prices to consumers, we will not condemn such practices absent a showing that they are truly predatory.

72. Thus, we conclude that the statute permits a carrier evaluating whether to launch a winback campaign to use CPNI to target valued former customers who have switched service providers. The carrier legitimately obtained that CPNI in its capacity as the customer's telecommunications provider. Importantly, such CPNI use does not impact customer privacy in any substantial respect because the former customer-carrier relationship previously enabled the carrier to use this same telecommunications usage information.[197] We believe this interpretation of section 222(c)(1) best comports with notions of consumer privacy, competition and customer control.

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[194] Allegiance Telecom Comments at 5-9; Commonwealth Telecom Comments at 5-9; Focal Communications Comments at 5-9; KMC Telecom Comments at 5-9; Time Warner Telecom Reply Comments at 8.

[195] Allegiance Telecom Comments at 10-12; Commonwealth Telecom Comments at 10-12; Focal Communications Comments at 10-12; KMC Telecom Comments at 10-12.

[196] *See, e.g.*, 47 C.F.R. §§ 61.41, 61.42, 62.45. *See generally* 47 U.S.C. § 202; *AT&T Communications Revisions to Tariff FCC No. 12*, 6 FCC Rcd 7039 (1991), *aff'd sub nom. Competitive Telecommunications Association v. FCC*, 998 F.2d 1058 (1993).

[197] AT&T Comments at 4-5.

73. An important limitation derived from the statutory language is that the carrier may use CPNI of the former customer to offer that customer the service or services to which the customer previously subscribed. It would be inconsistent with the total service approach for a carrier to use such CPNI to offer new services outside the former customer-carrier relationship.

74. Some petitioners assert that winback is permissible under the exceptions enumerated in Section 222(d)(1) that allow the use of CPNI without customer approval to "render" or "initiate" service.[198] Based upon our decision that the use of CPNI to winback customers is consistent with section 222(c)(1), we decline to reach these arguments. Similarly, we need not address arguments concerning the constitutionality of, propriety under the APA, and forbearance from,[199] the former rule. Consequently, we eliminate section 64.2005(b)(3). We therefore do not need to reach the clarification petitions submitted on the former rule.[200]

3. Retention of Customers

a. Background

75. As noted above, the *CPNI Order* also prohibited a carrier's access to or the use of the CPNI of a "soon-to-be-former" customer to market the same services to retain that customer.[201] The *CPNI Order* did not distinguish between marketing for the purpose of retaining customers versus regaining them. As explained above, on reconsideration, we believe that use of CPNI to regain former customers falls within the ambit of section 222(c)(1). We conclude here that use of CPNI to retain customers ordinarily does not come

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[198] *See* 47 U.S.C.§ 222(d)(1); AT&T Petition at 2-3; CTIA Petition at 32; PCIA Petition at 10; Omnipoint Petition at 18; Vanguard Petition at 14.

[199] Bell Atlantic Petition at 17-20; CTIA Petition at 35-42; GTE Petition at 37-39; PCIA Petition for Forbearance at 15-16; PrimeCo Petition at 15-16. To the extent that petitioners request that the Commission forbear from restricting the use of CPNI in customer retention efforts, we address those arguments in the following section, Part V.C.3.

[200] Comcast Petition at 18 (clarification sought regarding the circumstances where a customer has "switched to another carrier"). *See also* PCIA Petition at 11 (supposed conflict created where a customer properly gives express approval to a carrier to use CPNI until that approval is revoked and the inability of a carrier to engage in winback under the former rule); GTE Petition at 34 (same); PrimeCo Petition at 10 (same).

[201] *CPNI Order*, 13 FCC Rcd at 8126-27, ¶ 85.

under section 222(c)(1), and in such instances would likely violate section 222(b).[202]

76. Several petitioners ask the Commission to reconsider Section 64.2005(b)(3) to permit use of CPNI for the retention of soon-to-be former customers without customer approval.[203] On the other hand, other petitioners request that the Commission expressly prohibit ILECs from engaging in retention marketing.[204] These petitioners claim that ILECs are using information derived solely from their status as providing carrier-to-carrier services to their competitors in an anti-competitive manner.[205] Petitioners argue that the use of another carrier's order, including a carrier or customer request to lift a PIC freeze, is clearly and separately forbidden by sections 222(b) and 201(b).[206] As a remedy, MCI suggests, and both TRA and Intermedia agree, that the Commission should conclude that CPNI includes the identity of a chosen carrier.[207] Intermedia urges the Commission to mandate that ILECs maintain a bright-line separation between ILEC presubscription operations, retail operations, and wholesale operations.[208]

b. Discussion

77. We conclude that section 222 does not allow carriers to use CPNI to retain soon-to-be former customers where the carrier gained notice of a customer's imminent cancellation of service through the provision of carrier-to-carrier service. We conclude that competition is harmed if *any* carrier uses carrier-to-carrier information, such as switch or PIC orders, to trigger retention marketing campaigns, and consequently prohibit such actions

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[202] 47 U.S.C. § 222(b) provides: "[a] telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and *shall not use such information for its own marketing efforts*." (emphasis added).

[203] SBC Petition at 8; USTA Petition at 6.

[204] Frontier Petition at 9; MCI Petition at 50.

[205] Frontier Petition at 9; MCI Petition at 49-50; *see also* Cable & Wireless Comments at 4; TRA Comments at 7-8.

[206] AT&T Petition at 2-3, n.3 (referring to *CPNI Order*, 13 FCC Rcd at 8126-27, ¶ 85 & n.316.)

[207] MCI Petition at 51-52; Intermedia Communications Comments at 5; TRA Comments at 8.

[208] Intermedia Communications Comments at 5. Intermedia also suggests, based on Frontier's assertion, that the Commission should modify section 64.2005(b) of the rules by adding:

> "[A telecommunications] carrier may not use any information--including customer name, address, and telephone number--derived from the provision of carrier-to-carrier services, including the identity of the competitor, to regain the business of a customer who has switched to another service provider [prior to effectuating the switch]." *Id.*

accordingly. Congress expressly protected carrier information in section 222(a) by creating a duty to protect the confidentiality of proprietary information of other carriers, including resellers.[209] Section 222(b) restricts the use of such proprietary information and contains an outright prohibition against the use of such information for a carrier's own marketing efforts. As stated in the *CPNI Order*, Congress' goals of promoting competition and preserving customer privacy are furthered by protecting competitively-sensitive information of other carriers, including resellers and information service providers, from network providers that gain access to such information through their provision of wholesale services.[210]

78. The Commission previously determined that carrier change information is carrier proprietary information under section 222(b).[211] In the *Slamming Order*, the Commission stated that pursuant to section 222(b), the carrier executing a change "is prohibited from using such information to attempt to change the subscriber's decision to switch to another carrier."[212] Thus, where a carrier exploits advance notice of a customer change by virtue of its status as the underlying network-facilities or service provider to market to that customer, it does so in violation of section 222(b). We concede that in the short term this prohibition falls squarely on the shoulders of the BOCs and other ILECs as a practical matter. As competition grows, and the number of facilities-based local exchange providers increases, other entities will be restricted from this practice as well.

79. We agree with SBC and Ameritech that section 222(b) is not violated if the carrier has independently learned from its retail operations that a customer is switching to another carrier; in that case, the carrier is free to use CPNI to persuade the customer to stay, consistent with the limitations set forth in the preceding section. We thus distinguish between the "wholesale" and the "retail" services of a carrier. If the information about a customer switch were to come through independent, retail means, then a carrier would be free to launch a "retention" campaign under the implied consent conferred by section 222(c)(1).

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[209] Section 222(a) provides: [e]very telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunications carriers, equipment manufacturers, and customers, including telecommunication carriers reselling telecommunications services provided by a carrier."

[210] *CPNI Order*, 13 FCC Rcd at 8201-02, ¶ 206. We note that the *CPNI Order* sought comment on what, if any, safeguards are necessary to protect the confidentiality of carrier information and whether additional regulation is warranted. *Id.* Accordingly, we will revisit these issues in a future order.

[211] *Implementation of the Subscriber Carrier Selection Changes Provision of the Telecommunications Act of 1996, Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, Second Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 94-129, FCC 98-334, 14 FCC Rcd at 1567-9, ¶¶ 97-101 (rel. Dec. 23, 1998) ("*Slamming Order*") (concluding that Section 222(b) prohibits executing carriers from using carrier change information to verify a subscriber's decision to change carriers after such change has been verified by the submitting carrier).

[212] *Slamming Order*, 14 FCC Rcd 1508, at 1572-3, ¶ 106.

c. Petitions for Forbearance

80. A number of petitioners seek forbearance from restrictions that limit the ability of a carrier to retain a soon-to-be former customer who has indicated an intent to switch carriers.[213] Petitioners request forbearance from the application of rules prohibiting retention marketing, however, as part of their overall requests that the Commission forbear from applying winback restrictions generally.[214] Because the Commission has revised its interpretation and eliminated rule 64.2005(b)(3),[215] that portion of their petitions is moot.

81. As we described in detail supra, section 10 of the Act requires the Commission to forbear from regulation when: (1) enforcement is not necessary to ensure that the carrier's charges and practices are just and reasonable; (2) enforcement is not necessary for the protection of consumers; and (3) forbearance is consistent with the public interest.[216] For the reasons discussed below, we conclude the forbearance standard has not been met to the extent that carriers would seek to use CPNI to regain a soon-to-be former customer, precipitated by the receipt of a carrier-to-carrier order.

82. *Section 10(a)(1).* Petitioners assert that limiting the use of CPNI in retention efforts is not necessary to ensure just, reasonable, and nondiscriminatory rates.[217] For example, Bell Atlantic asserts that when a carrier attempts to retain a customer who has decided to switch to a competitor, a carrier will likely offer the customer lower, or at least not higher, rates than the customer was previously receiving.[218] Because these same rates have to be available to other customers, Bell Atlantic reasons that by definition there can be no discrimination.[219] GTE adds that because the rule has nothing to do with pricing, elimination

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[213] Bell Atlantic Petition at 17, n.16 (stating that it offers, as part of a winback program, an analysis of existing customer's calling patterns and services in order to retain that customer); CTIA Petition at 40 (observing that customer retention and winback efforts are intensely procompetitive for CMRS customers) PCIA Petition for Forbearance at 16 (espousing view that customer retention campaigns are a major tool of CMRS providers); GTE Petition at 33, 37-39; PrimeCo Petition at 15-16.

[214] Bell Atlantic Petition at 16-20; CTIA Petition at 34-42; PCIA Petition for Forbearance at 15-16; GTE Petition at 33, 37-39; PrimeCo Petition at 15-16.

[215] 47 C.F.R. § 64.2005(b)(3).

[216] *See* discussion *supra* Part V.A.3.

[217] *E.g.*, Bell Atlantic Petition at 17.

[218] Bell Atlantic Petition at 17.

[219] Bell Atlantic Petition at 17.

of the rule cannot have a negative effect on pricing, and that the rule works to prevent carrier initiated price breaks.[220]

83. We agree with GTE that the primary focus of the CPNI rules is not, nor ever has been, intended to ensure reasonable rates or practices. Therefore, we determine that enforcement of section 222's prohibition against allowing a carrier to use proprietary information that it receives by virtue of fulfilling carrier-to-carrier orders in a "wholesale" capacity is not necessary to ensure that the charges, practices, classifications, or regulations are just and reasonable and are not unjustly or unreasonably discriminatory.

84. *Section 10(a)(2).* Petitioners assert that retention restrictions are not necessary to protect customers generally.[221] Bell Atlantic argues that use of CPNI for retention aids in the early detection of slamming.[222] In the *Slamming Order*, however, the Commission cited concern that executing carriers would have the incentive and ability to delay or deny carrier changes, using the detection of slamming as an excuse in order to benefit themselves or their affiliates.[223] In addition, GTE asserts that there are no privacy concerns in a retention situation.[224] Although we agree that privacy concerns are not particularly jeopardized in winback situations, generally, that does not mean that enforcement of this restriction is unnecessary to protect customers. Rather, we conclude that consumers' substantial interests in a competitive and fair marketplace would be undermined if this restriction was not enforced. Consequently, the second criterion is not satisfied.

85. *Section 10(a)(3).* Finally, petitioners contend that customer retention is in the public interest.[225] We are not persuaded, however, that permitting carriers to unfairly use information that they obtain in a "wholesale" capacity is in the public's interest. First, Bell Atlantic and CTIA assert that customer retention campaigns place consumers in the attractive position of having two competitors simultaneously vying for the consumers' business.[226] Although we acknowledge that in the short-run allowing carriers to use carrier proprietary

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[220] GTE Petition at 37-38. *See* PrimeCo Petition at 15.

[221] Bell Atlantic Petition at 18-19; GTE Petition at 38; PCIA Petition for Forbearance at 15. *See* PrimeCo Petition at 15.

[222] Bell Atlantic Petition at 19.

[223] *Slamming Order*, 14 FCC Rcd 1508 at 1568, ¶ 99 (section 222(b) prohibits a carrier receiving a customer change request from another carrier from contacting the customer for additional verification).

[224] GTE Petition at 38.

[225] *E.g.*, Bell Atlantic Petition at 19-20; CTIA Petition at 40; PCIA Petition for Forbearance at 16.

[226] Bell Atlantic Petition at 19-20; CTIA Petition at 40-41.

information to trigger retention campaigns may result in lower rates for some individual customers, for the reasons stated above we do not believe that this would be the result over the long-term. Moreover, CTIA adds that forbearance is consistent with the public interest and Commission precedent because it will prevent CMRS carriers from incurring the significant costs of revamping their marketing practices.[227] According to CTIA, the Commission has twice determined that cost savings to carriers from forbearance supports a section 10(a) public interest finding.[228] We do not agree that permitting incumbent carriers to save costs at the expense of competing carriers, as would be the case under these circumstances, is in the public interest. We conclude that there is insufficient basis for a public interest finding in this instance under the third criterion. Therefore, we deny the forbearance petitions on this issue.

D. Disclosure of CPNI to New Carriers When a Customer is "Won"

86. In the *CPNI Order* we definitively concluded that the term "initiate" in section 222(d)(1) does not require that a customer's CPNI be disclosed by a carrier to a competing carrier who has "won" the customer as its own.[229] We found that section 222(d)(1) applies only to carriers already possessing the CPNI, within the context of the existing service relationship, and not to any other carriers merely seeking access to CPNI.[230] We noted, however, that section 222(c)(1) does not prohibit carriers from disclosing CPNI to competing carriers upon customer approval.[231] Accordingly, we reasoned that although an incumbent carrier is not required to disclose CPNI pursuant to section 222(d)(1) or section 222(c)(2) absent an affirmative written request, local exchange carriers may need to disclose a customer's service record upon oral approval of a customer to a competing carrier prior to its commencement of service as part of a local exchange carrier's section 251(c)(3) and (c)(4) obligations.[232] In this way, we concluded, section 222(c)(1) permits the sharing of customer

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[227] CTIA Petition at 41-42.

[228] CTIA Petition at 41-42 (citing *Federal Communications Bar Ass'n Petition for Forbearance Under Section 310(d) of the Communications Act*, Memorandum Opinion and Order, FCC 98-18 (rel. Feb. 4, 1998) 13 FCC Rcd 6293 (1998) ("*FCBA Forbearance Order*") and *Bell Operating Companies Petition for Forbearance from the Application of Section 272 of the Communications Act*, CC Docket No. 96-149, Memorandum Opinion and Order, 13 FCC Rcd 2627 (Comm. Car. Bureau 1998) ("*BOC Forbearance Order*")). *See* PrimeCo Petition at 16.

[229] *CPNI Order*, 13 FCC Rcd at 8125-26, ¶ 84.

[230] *CPNI Order*, 13 FCC Rcd at 8125-26, ¶ 84.

[231] *CPNI Order*, 13 FCC Rcd at 8125-26, ¶ 84.

[232] *CPNI Order*, 13 FCC Rcd at 8125-26, ¶ 84.

records necessary for the provisioning of service by a competitive carrier.[233] Finally, we also noted that a carrier's failure to disclose CPNI to a competing carrier that seeks to initiate service to that customer who wishes to subscribe to a competing carrier's service, may well constitute an unreasonable practice in violation of section 201(b), depending on the circumstances.[234]

87. We reject MCI's various requests for disclosure of CPNI by former carriers, *without* customer approval, to new carriers to enable the new carriers to initiate service. TRA supports some of,[235] and several carriers oppose some or all of MCI's requests.[236] For the reasons stated below, we deny MCI's petition in this regard.

88. First, MCI and TRA ask that we find that section 222(d)(1) allows "one carrier to disclose CPNI to another to enable the latter to initiate service *without* customer approval"[237] thereby reversing our conclusion in the *CPNI Order*. Neither MCI nor TRA has presented any new facts or arguments that the Commission did not fully consider in the *CPNI Order* regarding the interpretation of section 222(d)(1). We therefore deny MCI and TRA's request that we reverse this portion of the *CPNI Order*.

89. Second, MCI also requests that the Commission, in any case, find that section 222(c)(1) authorizes the disclosure of CPNI *without* customer approval.[238] MCI argues that the disclosure of CPNI by a carrier in order for another carrier to initiate the same category of service as the disclosing carrier falls within "the [disclosing carrier's] provision of" service under section 222(c)(1)(A) and is, therefore, permitted in the absence of customer approval.[239] We find that MCI's request is contrary to our conclusion in the *CPNI Order* that the language of 222(c)(1)(A) reflects Congress' judgment that customer approval for carriers to use, disclose, and permit access to CPNI can be inferred in the context of *an existing customer relationship*.[240] We reasoned that such an inference is appropriate because the customer is

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[233] *CPNI Order*, 13 FCC Rcd at 8125-26, ¶ 84.

[234] *CPNI Order*, 13 FCC Rcd at 8126-27, ¶ 85.

[235] TRA Comments at 5-6.

[236] *E.g.*, Ameritech Comments at 11-12; Bell Atlantic Comments at 7-8; GTE Comments at 22, n.68; SBC Comments at 15-17; U S WEST Comments at 10-12.

[237] MCI Petition at 27-28; TRA Comments at 5-6.

[238] MCI Petition at 28-29.

[239] MCI Petition at 28-29; MCI Reply at 38.

[240] *CPNI Order*, 13 FCC Rcd at 8080, ¶ 23.

aware that his or her carrier has access to CPNI, and, through subscription to the carrier's service, has implicitly approved the carrier's use of CPNI *within the existing relationship.*[241] We are not persuaded that the disclosure of CPNI to a different carrier to initiate service *without* customer approval for that disclosure would be contemplated by a customer as a carrier's use of his or her CPNI within the existing customer-carrier relationship. As such, we deny MCI's request.

90. Third, MCI also asserts that sections 272, 201(b), and 202(a) require BOCs and other ILECs that disclose CPNI to affiliates without customer approval in order to initiate service to likewise disclose CPNI to any other requesting carrier "needing it to initiate service."[242] As described above, the *CPNI Order* stated that a carrier's failure to disclose CPNI to a competing carrier that seeks to initiate service to a customer who wishes to subscribe to a competing carrier's service may well constitute an unreasonable practice in violation of section 201(b), depending on the circumstances.[243] Moreover, we discuss at length the interaction of sections 272 and 222 elsewhere in this order, and affirm our previous conclusion that section 272 imposes no additional CPNI requirements on BOCs sharing CPNI with their section 272 affiliates.[244] MCI has not provided any reasonable basis for altering these conclusions. Further, we are not persuaded by MCI's unsupported request that section 202(a) would require such relief. Accordingly, we deny MCI's request.

91. Fourth, MCI further argues that if the Commission does not grant any of the relief requested, then it should allow carriers to notify customers that their failure to approve the disclosure of CPNI to a new carrier may disrupt the installation of any new service they may request.[245] MCI concludes that this would require a modification of the *CPNI Order's* requirement that notification of a customer's CPNI rights should not imply that approval is necessary to ensure the continuation of services to which the customer subscribes or the proper servicing of the customer's account.[246] As MCI has not persuaded us, however, that a customer's failure to approve such a disclosure may disrupt the installation of service, we deny MCI's request.

92. Finally, MCI requests that the Commission "reconfirm" that CPNI is an

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[241] *CPNI Order*, 13 FCC Rcd at 8080, ¶ 23.

[242] MCI Petition at 29.

[243] *CPNI Order*, 13 FCC Rcd at 8126, ¶ 85.

[244] *See* discussion *infra* Part VIII.A

[245] MCI Petition at 32-33.

[246] MCI Petition at 33. See *CPNI Order*, 13 FCC Rcd at 8162-63, ¶ 138; 47 C.F.R. § 2007(2)(iii).

unbundled network element "that BOCs and other ILECs must provide to all requesting carriers under section 251(c)(3) of the Act."[247] This is not a fair characterization of the *CPNI Order*'s conclusion. Rather, the *CPNI Order* held that local exchange carriers may need to disclose a customer's service record upon oral approval of a customer to a competing carrier prior to its commencement of service as part of a local exchange carrier's section 251(c)(3) and (c)(4) obligations.[248] This conclusion does not indicate, as MCI has implied, that CPNI is an unbundled network element subject to section 251(c)(3)'s unbundling requirements separate from the Commission's requirement that incumbent carriers provide unbundled access to operations support systems and the information they contain.[249] Therefore, MCI incorrectly concludes that the *CPNI Order* found that CPNI is an unbundled network element. In any case, the United States Supreme Court recently concluded that the Commission's unbundling rule, section 51.319 of the Commission's rules,[250] should be vacated.[251] As a result, the Commission reopened CC Docket 96-98 to refresh the record on the issues of (1) how, in light of the Supreme Court ruling, the Commission should interpret the standards set forth in section 251(d)(2) of the Telecommunications Act of 1996; and (2) which specific network elements the Commission should require incumbent LECs to unbundle.[252]

VI. "APPROVAL" UNDER SECTION 222(c)(1)

A. Grandfathering Pre-existing Notifications

93. On May 21, 1998, the Common Carrier Bureau released the *Clarification Order* clarifying several issues in the *CPNI Order*.[253] Among other things, the *Clarification Order* made it clear that carriers that have complied with the *Computer III* notification and prior written approval requirements in order to market enhanced services to business customers with more than 20 access lines are also in compliance with section 222 and the Commission's

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[247] MCI Petition at 21-23, 33-34.

[248] *CPNI Order*, 13 FCC Rcd at 8126, ¶ 84.

[249] *CPNI Order*, 13 FCC Rcd at 8126, ¶ 84 & n.315.

[250] 47 C.F.R. § 51.319 (1997).

[251] *AT&T Corp. v. Iowa Utilities Board*, 119 S.Ct. 721, 736 (1999).

[252] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket 96-98, FCC 99-70, Second Further Notice of Proposed Rulemaking (rel. April 16, 1999).

[253] *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket Nos. 96-115, Order, 13 FCC Rcd 12390 (1998) (*Clarification Order*).

rules.[254] CompTel and LCI request that the Commission reverse the *Clarification Order*'s conclusion.[255] We decline to do so for the reasons discussed below and, in fact, hereby adopt the *Clarification Order*.

94. As discussed in the *Clarification Order*, the framework established under the Commission's *Computer III* regime, prior to the adoption of section 222, governed the use of CPNI by the BOCs, AT&T, and GTE to market CPE and enhanced services.[256] Under this framework, those carriers were obligated to: (1) provide an annual notification of CPNI rights to multi-line customers regarding enhanced services, as well as a similar notification requirement that applied only to the BOCs regarding CPE; and (2) obtain prior written authorization from business customers with more than 20 access lines to use CPNI to market enhanced services.[257] The *CPNI Order*, however, replaced the *Computer III* CPNI framework in all material respects.[258] In its place, the *CPNI Order* established requirements compelling carriers to provide customers with specific one-time notifications prior and proximate to soliciting express written, oral, or electronic approval for CPNI uses beyond those set forth in sections 222(c)(1)(A) and (B).[259] The *CPNI Order* further established an express approval mechanism for such solicitations as it is the "best means to implement this provision because it will minimize any unwanted or unknowing disclosure of CPNI" and will also "limit the potential for untoward competitive advantages by incumbent carriers."[260]

95. The *Clarification Order* noted that, like the requirements established in the *CPNI Order*, "the notification obligation established by the *Computer III* framework required, among other things, that carriers provide customers with illustrative examples of enhanced services and CPE, expanded definitions of CPNI and CPE, information about a customer's right to restrict CPNI use at any time, information about the effective duration of requests to restrict CPNI, and background information to enable customers to understand why they were

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[254] *Clarification Order*, 13 FCC Rcd at 12398-99, ¶ 12. The *Clarification Order* noted, however, that carriers must still provide notification and obtain approval pursuant to the rules promulgated under the *CPNI Order* to use CPNI to market telecommunications services that fall outside the scope of their existing service relationship to business customers with more than 20 access lines that have already given *Computer III* authorizations. *Id.*, at 12399, n.30.

[255] CompTel Petition at 22; LCI Petition at 18. *See also* Intermedia Comments at 14.

[256] *Clarification Order*, 13 FCC Rcd at 12397-98, ¶ 10.

[257] *Clarification Order*, 13 FCC Rcd at 12397-98, ¶ 10.

[258] *CPNI Order*, 13 FCC Rcd at 8187, ¶ 180.

[259] *CPNI Order*, 13 FCC Rcd at 8128, ¶ 87.

[260] *CPNI Order*, 13 FCC Rcd at 8130-31, ¶ 91.

being asked to make decisions about their CPNI."[261] The *Clarification Order* determined that these *Computer III* notifications comply materially with the form and content of the notices required by the *CPNI Order*.[262] In addition, the *Clarification Order* concluded that the *Computer III* requirement to obtain prior written authorization constitutes a form of express, affirmative approval, as required by section 222.[263] Accordingly, the *Clarification Order* concluded that carriers that complied with the *Computer III* notification and prior written approval requirement in order to market enhanced services to such carriers are also in compliance with section 222 and the Commission's rules.[264]

96. CompTel, LCI, and Intermedia assert that the *Computer III* authorizations received from business customers with more than 20 lines are invalid and, as such, that conclusion of the *Clarification Order* should be reversed.[265] In support of their positions, they all note that the *CPNI Order* rules require that notification be proximate to and precede customer authorization, although that was not required under the *Computer III* regime.[266] Moreover, CompTel asserts, the rules promulgated under section 222 require that carriers inform customers that their service will not be affected by refusing to sign CPNI waivers "whereas BOCs frequently told customers they might have to change account representatives if they did not grant a waiver."[267] Finally, LCI and Intermedia argue that as the *Computer III* consents were given prior to the advent of local competition, business customers may have felt "compelled" to grant consent in a monopoly environment.[268] For these reasons, CompTel

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[261] *Clarification Order*, 13 FCC Rcd at 12398-99, ¶ 12.

[262] *Clarification Order*, 13 FCC Rcd at 12398-99, ¶ 12.

[263] *Clarification Order*, 13 FCC Rcd at 12398-99, ¶ 12.

[264] *Clarification Order*, 13 FCC Rcd at 12398-99, ¶ 12.

[265] CompTel Petition at 22; LCI Petition at 18; Intermedia Comments at 14.

[266] CompTel Petition at 22; LCI Petition at 18; Intermedia Comments at 14. Section 64.2007(f) of the Commission's rules requires that "[p]rior to any solicitation for customer approval, a telecommunications carrier must provide a one-time notification to the customer of the customer's right to restrict use of, disclosure of, and access to that customer's CPNI." 47 C.F.R. § 64.2007(f). Moreover, section 64.2007(f)(3) states that "[a] telecommunications carrier's solicitation for approval must be proximate to the notification of a customer's CPNI rights." 47 C.F.R. § 64.2007(f)(3).

[267] CompTel Petition at 22. Section 64.2007(f)(2)(iii) of the Commission's rules states, in relevant part, that "[t]he notification must . . . clearly state that a denial of approval will not affect the provision of any services to which the customer subscribes." 47 C.F.R. § 2007(f)(2)(iii).

[268] LCI Petition at 18; Intermedia Comments at 14.

and LCI assert that the *Computer III* consents at issue were not "informed."[269]

97. Ameritech opposes reversing the *Clarification Order*, arguing that even the rules promulgated under the *CPNI Order* do not require that customer authorizations "evaporate" in the event that the competitive environment changes.[270] Furthermore, Ameritech contends that when BOCs informed customers that they may have to change account representatives if they did not waive their CPNI rights it was probably the result of the Commission's "mechanical blocking" requirements for personnel that were involved in the marketing of enhanced services.[271] Bell Atlantic also opposes reversing the *Clarification Order* in this respect, arguing that the notifications followed the rules then in effect and that customers were told that their authorizations were effective until revoked.[272] Bell Atlantic argues that there is no public interest reason to require carriers and customers to repeat the affirmative authorization process.[273]

98. We agree with the Bureau that carriers that have complied with the *Computer III* notification and prior written approval requirements in order to market enhanced services to certain large business customers should be deemed in compliance with section 222 and the Commission's rules.[274] For the reasons stated in the *Clarification Order*, we agree that the *Computer III* framework required carriers to provide these large business customers with adequate notice and obtain express, affirmative approval in material compliance with the form and content of those required by section 222 and the Commission's rules.[275] Although it is true that the *Computer III* consents were given prior to the advent of local competition, we believe that the detailed notice and express, affirmative consent required under that regime compensate for this deficiency. Moreover, we are not persuaded by CompTel's assertion that the BOCs warnings that they *may* have to change the customer's account representatives put undue pressure on these business customers to relent. Finally, we also conclude that although some of the *Computer III* annual notifications may not have been "proximate to" the carrier

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[269] CompTel Petition at 22; LCI Petition at 18.

[270] Ameritech Comments at 13.

[271] Ameritech Comments at 13.

[272] Bell Atlantic Reply at 8.

[273] Bell Atlantic Reply at 8.

[274] *Clarification Order*, 13 FCC Rcd at 12398-99, ¶ 12. The *Clarification Order* noted that carriers must still provide notification and obtain approval pursuant to the rules promulgated under the *CPNI Order* to use CPNI to market telecommunications services that fall outside the scope of their existing service relationship to business customers with more than 20 access lines that have already given *Computer III* authorizations. *Id.* at n.30.

[275] *Clarification Order*, 13 FCC Rcd at 12398-99, ¶ 12.

solicitations as required by section 222, the *Computer III* regime's annual notification requirement and limitation to business customers with more than 20 access lines—requirements that we note are more stringent than required by section 222—materially satisfy the concerns we intended to address by the proximate notification requirement promulgated in the *CPNI Order*. As such, we agree with the Bureau that the *Computer III* notifications are in material compliance with section 222 and the Commission's rules, and adopt the reasoning and conclusions of the *Clarification Order* as our own.

99. Other carriers request that the Commission "grandfather" authorizations obtained subsequent to the enactment of section 222, but prior to the promulgation of rules in the *CPNI Order*.[276] AT&T requests that the Commission clarify that the rules promulgated in the *CPNI Order* have prospective application only and, as such, that AT&T may continue to rely on approvals it obtained from customers in an attempt to comply with section 222 prior to the *CPNI Order*.[277] Bell Atlantic, CWI, and Sprint support AT&T's request.[278] All four of these carriers argue that it would be confusing to customers and a waste of resources to require the resolicitation of these authorizations.[279] U S WEST and GTE agree that such authorizations should be grandfathered, but only where they are in writing.[280] In contrast, however, MCI opposes any grandfathering.[281]

100. Several carriers requesting that we "grandfather" these authorizations have provided descriptions of varying detail of their solicitations. AT&T's description was the most detailed. Subsequent to the enactment of section 222, but prior to the *CPNI Order*, AT&T apparently solicited millions of its customers for consent to use their CPNI to market new products and services to them by reading prepared solicitations to them over the phone during inbound and outbound calls.[282] AT&T's various versions of its script all essentially stated that AT&T would like to inform the customer about "other" AT&T products and services from time-to-time and requested permission to use the customer's "account

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[276] AT&T Petition at 18-22; CWI Comments at 5-7; GTE Comments at 24; Sprint Comments at 9-10; U S WEST Comments at 15-18; LCI Reply at 5.

[277] AT&T Petition at 18.

[278] CWI Comments at 6; Sprint Comments at 9; Bell Atlantic Reply at 7.

[279] AT&T Petition at 20; CWI Comments at 6; Sprint Comments at 9; Bell Atlantic Reply at 8.

[280] GTE Comments at 24; U S WEST Comments at 16.

[281] MCI Comments at 45-48.

[282] AT&T Petition at 19 and Appendix A.

information" to aid in this purpose.[283] AT&T argues that the "non-trivial" percentage of customers who declined to authorize the use of their CPNI indicates that customers "understood AT&T's explanation, understood their rights, and—where it was given—consent was informed."[284] To "ameliorate" the possibility that customers may not have been fully advised of their rights, AT&T has offered to send customers who gave their approval to AT&T's solicitations written notices of their rights including an explanation that they have a right to withdraw their approval.[285] We conclude, based upon the evidence presented in the record of this proceeding, that AT&T's solicitations constitute a good faith effort to materially comply with section 222 provided they are supplemented with the curative written notification of rights AT&T has offered to distribute. Accordingly, we find that AT&T may continue to rely on the approvals given, provided the approvals were obtained in the manner detailed above, so long as AT&T supplements those approvals with a written notice to customers of their rights including an explanation that they have the right to withdraw their approval.

101. The descriptions provided by the other carriers are too brief to analyze whether their solicitations were adequate. For example, Sprint only states that it "informed [several hundred thousand] customers that they had to give their permission to enable Sprint to review their account information in order to inform them about other Sprint-branded services and products."[286] CWI merely states that it "requested CPNI use approval from consumers who became customers after the 1996 Communications Act was enacted" and that it "amended its order forms to include a CPNI notice and approval section in its terms and conditions."[287] Finally, Bell Atlantic briefly notes that it "provided written notice to thousands of its customers of their CPNI rights and secured written release from many of those customers."[288] We conclude that these descriptions are inadequate to make a determination about whether the notices given and the solicitations made are in material compliance with section 222.

102. Other than AT&T, the parties in this proceeding have not provided sufficient detail describing their solicitations for the Commission to make a determination of material compliance. We urge them to examine the showing made by AT&T as discussed above. We will accept further waiver requests that are materially compliant with section 222, provided

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[283] AT&T Petition at Appendix A.

[284] AT&T Petition at 20. Of the 27.9 million customers solicited, 24 million agreed to AT&T's request. *Id.* at 19-20.

[285] AT&T Petition at 21.

[286] Sprint Comments at 9.

[287] CWI Comments at 8.

[288] Bell Atlantic Reply at 8.

the carriers requesting waivers can make a showing similar to the one made by AT&T.

B. Oral and Written Notification

1. Background

103. Section 64.2007 of the Commission's Rules sets out several requirements for carriers who wish to obtain a customer's consent for the use of that customer's CPNI. Carriers must obtain customer *approval* to use, disclose, or permit access to CPNI for marketing purposes. Prior to seeking customer approval, however, carriers must provide a one-time *notification* to the customer of her or his rights to restrict the use or disclosure of, and access to, her or his CPNI. Carriers may provide oral or written notification. Once a customer is notified of her or his rights, the carrier may undertake a *solicitation* of the customer's approval. Solicitation for approval must be proximate to the notification. If the solicitation for approval is written, then it "must not be on a document separate from notification,"[289] even if the solicitation is included in the same envelope.

104. Vanguard requests that the Commission clarify the requirements established in the *Order* for telecommunications providers seeking customer consent for the use of CPNI.[290] Vanguard expresses concern that the rules will hinder providers from obtaining consent at the time of the execution of initial customer agreements. Specifically, Vanguard requests clarification that:[291]

> it would be appropriate to provide customers with a basic disclosure of the nature of their CPNI rights at or near the signature line of a customer agreement, with both a specific, direct reference to a more complete disclosure elsewhere in the document and an opportunity for the customer to choose whether or not to consent to the use of that customer's CPNI.

U S WEST opposes the clarification requested by Vanguard on the grounds that carriers should be left with flexibility in implementing the rules, and a notification in the body of the contract could be just as compliant as at the signature line.[292]

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289 47 C.F.R. §64.2007(f)(4).

290 Vanguard Petition at 18-19.

291 Vanguard Petition at 18-19.

292 U S WEST Comments at 24.